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No. 07-___

In the
Supreme Court of the United States

TED A. BRODOWY, DIRK BROWN, CAROLYN M. GANDY, RON D. GANDY, TRACY JENSON, KENNETH B. KARNATH, JONATHAN A. MENDELSON, CLYDE A. SMITH, SHARON WILKINS, and MARILYN YAMAMOTO,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Federal Circuit Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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September 20, 2007

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Federal Circuit's dismissal of Petitioners' case on the merits for having allegedly failed to state a claim upon which relief could be granted without affording Petitioners an opportunity to be heard on the merits, and because that court did not take the factual allegations within Petitioners' complaint as true, conflict with Civil Rule 12 and this Court's decisions in *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106 (1976) and *Jones v. Bach*, 27 S. Ct. 910 (2007)?

2. Did the Federal Circuit's decision that Petitioners were not entitled to application of 5 U.S.C. §5334(b) to their transfer to higher grade facilities in 1999 while under the GS Pay System conflict with that statutory provision and this Court's decision in *United States v. Clark*, 454 U.S. 555 (1982)?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioners state that all parties to the proceedings appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

CITATIONS OF OPINIONS AND ORDERS

The opinion of the U.S. Court of Appeals for the Federal Circuit is reported at 482 F.3d 1370 (Fed. Cir. 2007). (App. 1A.) The Federal Circuit's Order denying Petitioners' petition for rehearing is unreported. (App. 32A.) The judgment and opinion of the U.S. Court of Federal Claims are unreported. (App. 12A, 13A.)

JURISDICTION

The Federal Circuit's opinion and judgment were entered on April 12, 2007. (App. 1A.) The Federal Circuit denied Petitioners' petition for rehearing on June 22, 2007. (App. 32A.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

5 U.S.C. §5334(b) provides:

An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. If, in the case of an employee so promoted or transferred who is receiving basic pay at a rate in excess of the maximum rate of his grade, there is no rate in the higher grade which is at least two step-increases above his existing rate of basic

pay, he is entitled to-- (1) the maximum rate of the higher grade; or (2) his existing rate of basic pay, if that rate is the higher.

USCS Claims Court Civil Rule 12(b) provides:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) [not used], (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under RCFC 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in RCFC 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by RCFC 56.

STATEMENT OF THE CASE

I. Introduction

Petitioners Ted A. Brodowy, Dirk G. Brown, Carolyn M. Gandy, Ron D. Gandy, Tracy A. Jenson, Kenneth B. Karnath, Jonathan A. Mendelson, Clyde A. Smith, Sharon Wilkins, and Marilyn Yamamoto are ten former or current air traffic controllers employed at air traffic facilities around the country. The factual circumstance giving rise to this lawsuit occurred in 1999, when Petitioners transferred from their Level 1 air traffic facilities to higher grade air traffic facilities under the GS pay system, and yet respondent FAA did not apply 5 U.S.C. §5334(b) to their transfer, so as to confer upon them a two step increase in pay under the GS system, at their new higher grade facility.

On August 31, 2005, Petitioners filed a complaint in the court of claims seeking an order that would direct respondent FAA to apply §5334(b) to them upon their transfer to higher grade facilities for purposes of establishing their appropriate GS grade and step level at that facility under the GS pay system. Respondent never answered the complaint, but instead filed a motion to dismiss pursuant to Civil Rule 12 asserting that the court of claims lacked subject matter jurisdiction over this case. On July 11, 2006, the court of claims granted respondent's motion to dismiss Petitioners' complaint.

Petitioners timely appealed from the court of claims' dismissal of their complaint for lack of subject matter jurisdiction to the Federal Circuit

Court of Appeals. In a decision issued on April 12, 2007, that court agreed with Petitioners that the court of claims erred in dismissing Petitioners' complaint for lack of subject matter jurisdiction. However, the court of appeals rejected Petitioners' factual allegation within their complaint that they transferred to their higher grade facilities in 1999 while under the GS pay system and dismissed Petitioners' complaint on the merits for allegedly having failed to state a claim upon which relief may be granted. On June 22, 2007, the court of appeals denied Petitioners' petition for rehearing.

It is from the decision of the court of appeals that Petitioners have filed their instant petition for a writ of certiorari with this Court. This Court should grant this petition for the following reasons:

1) The Federal Circuit dismissed Petitioners' case on the merits for having allegedly failed to state a claim upon which relief could be granted without affording Petitioners an opportunity to be heard on the merits, and failing to take the factual allegations within their complaint as true, in conflict with Civil Rule 12 and this Court's decisions in *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106 (1976) and *Jones v. Bach*, 27 S. Ct. 910 (2007); and

2) The Federal Circuit's decision that Petitioners were not entitled to application of 5 U.S.C. §5334(b) for purposes of providing them with a two step increase in pay under

the GS pay system when they transferred to higher grade air traffic facilities in 1999 is in conflict with that statutory provision and this Court's decision in *United States v. Clark*, 454 U.S. 555 (1982).

II. The Underlying Facts

The facts giving rise to this lawsuit are as follows.[1] Prior to October 1998, all air traffic controllers, including Petitioners, were employed by the FAA at a Level 1 through Level 5 air traffic facility. (Complaint at ¶ 18; App. 38A.) The classification of a facility as a Level 1 through Level 5 depended upon the complexity and volume of the air traffic to be handled at that facility. (*Id.*)

During the period of 1994 through 1998, the FAA privatized the operations at 129 Level 1 air traffic controllers. This decision by the FAA caused all air traffic controllers at Level 1 facilities to either 1) relocate to another FAA facility in order to remain employed by the FAA as air traffic specialists, or 2) retire or resign from the Federal service. (Complaint at ¶¶ 16-17; App. 37A.)

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[1] Because Petitioners seek review of a decision by the court of appeals that dismissed their complaint for having allegedly failed to state a claim upon which relief can be granted pursuant to Civil Rule 12, as a matter of law all factual allegations within Petitioners' complaint are true and all reasonable inferences therefrom are to be drawn in Petitioners' favor. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Accordingly, Petitioners refer to the factual allegations within their complaint for purposes of setting forth the underlying facts in this case.

As a result of this decision by the FAA to privatize Level 1 air traffic facilities, the air traffic controllers' union challenged the privatization of Level 1 air traffic facilities in court. On March 2, 1998, in response to that judicial challenge, the U.S. District Court for the Northern District of Ohio in *National Air Traffic Controllers Ass'n. v. Sec'y. of DOT*, 97 F.Supp 874 (N.D. Ohio 1998), stayed the FAA's privatization of FAA operated Level 1 towers for the reason that the FAA had failed to engage in the proper cost/benefit requirements of the Office of Management and Budget Circular A-76. At the time of the court decision, the FAA had already privatized over 75% of its Level 1 air traffic facilities with the remaining Level 1 air traffic facilities scheduled for privatization in August, 1998. (Complaint at ¶ 22; App. 39A.) This decision delayed Petitioners from transferring from their Level 1 air traffic facility, previously scheduled for August 1998, to a higher grade air traffic facility. (Complaint at ¶ 24; App. 39A.)

In July, 1998, the FAA and National Air Traffic Controllers Association ("NATCA") entered a collective bargaining agreement ("CBA") regarding the institution of a new air traffic control (ATC) pay system, which was to go into effect October 1, 1998. This new pay system was created by reason of a $200 million surplus through the reduction of frontline personnel, which money was to be equitably divided up and distributed to controllers based upon their grade and step under the GS pay system. (Complaint at ¶¶ 31-32; App. 40A-41A.)

Conversion into the ATC pay system was based upon a formula tied into the air traffic controller's grade and step level under the (FG)GS pay system. (Complaint at ¶39; App. 44A.) Conversion into the ATC pay system was not supposed to deviate from the principle that each air traffic controller is to receive equal pay for substantially equal work. (Complaint at ¶33; App. 41A.) A conversion rule was adopted in the CBA for purposes of converting an air traffic controller from the GS pay system to the ATC pay system, based upon that employee's GS grade and step level at the time of conversion. (Complaint at ¶35; App. 41A.) The ATC pay system had pay bands, which were analogous to the pay steps under the GS pay system. (Complaint at ¶30; App. 40A.)

This ATC pay system went into effect on October 1, 1998 for all air traffic controllers situated at Level 2 through Level 5 facilities, who were converted into this pay system based upon their grade and step level in the GS pay system. (Complaint at ¶25; App. 39A.) The FAA did not convert Petitioners into the ATC pay system on October 1, 1998, but rather continued to pay them under the GS pay system. (Complaint at ¶27; App. 40A.)

In March 1999, the FAA concluded its due diligence in connection with the cost/benefit analysis as required by the court in *National Air Traffic Controllers Ass'n., supra,* and decided to privatize the remaining Level 1 air traffic facilities. (Complaint at ¶41; App. 45A.) In or about October, November, and December 1999 each of the

Petitioners transferred to higher grade air traffic facilities. (Complaint at ¶43; App. 45A.)

Upon reaching their higher grade air traffic facilities (a Level 2-5 facility under the GS system), the FAA did not apply 5 U.S.C. §5334(b) to them for purposes of granting them a two step increase in pay under the GS pay system. (Complaint at ¶ 46; App. 46A.) Rather, after arriving at their higher grade facilities, Petitioners converted into the ATC pay system based upon their GS grade and step level at their Level 1 facilities instead of the appropriate GS grade and step level assigned to their higher grade facilities. (*Id.*)

Because the FAA did not apply §5334(b) to Petitioners, which guaranteed a two step increase upon transfer to a higher level facility, for purposes of establishing Petitioners' GS grade and step at their new higher level facilities in 1999, they lost earned grade and pay steps under the GS pay system. (Complaint at ¶47; App. 46A.) This loss in grade and step under the GS system caused Petitioners to subsequently convert at a lower place on the ATC pay system. (*Id.*) All air traffic controllers who had transferred from Level 1 facilities to higher facilities during the years of 1994, 1995, 1996, and 1997, as part of the privatization of Level 1 air traffic facilities had §5334(b) applied to them for purposes of guaranteeing a two step increase in pay under the GS pay system at their higher grade facility. (Complaint at ¶19; App. 38A.)

III. Proceedings Before The Court of Claims

On August 31, 2005, the Petitioners filed suit in the U.S. Court of Federal Claims seeking an order that would require the FAA to apply 5 U.S.C. §5334(b) to them for purposes of granting them a two step increase in pay under the GS pay system upon their arrival at their at their higher grade facilities in or about October, November or December of 1999. Petitioners sought application of §5334(b) while under the GS pay system during this transfer, prior to their conversion into the ATC pay system at these higher grade facilities. On March 17, 2006, respondent filed a motion to dismiss Petitioners' complaint for lack of subject matter jurisdiction for allegedly having failed to cite to an applicable money mandating statute as a predicate for their complaint.

On July 11, 2006, the court of claims dismissed Petitioners' case for lack of subject matter jurisdiction finding that Petitioners had failed to cite to an applicable money mandating statute within their complaint. The court of claims acknowledged that 5 U.S.C. §5334(b) is a money-mandating statute stating, "None of the provisions cited by the Plaintiffs is money mandating, *except §5334(b).*" [Emphasis added.] (App. 30A.) However, the court rejected Petitioners' factual contention that their transfer to higher grade facilities consisted of two separate steps – *i.e.,* a transfer within the GS pay system to a new facility and second a conversion to the new ATC pay system. (App. 29A.) The court erroneously determined that Petitioners did not make that specific factual allegation within their complaint. (App. 29A.)

In that regard, Petitioners alleged at ¶¶ 52-61 of their complaint that they transferred to their higher grade facilities within the GS pay system, thus requiring application of §5334(b), and then converted into the ATC pay system. Specifically at ¶ 53 of their complaint, Petitioners alleged:

> "The United States unlawfully bypassed and violated its pay regulations by not applying 5 U.S.C. §5334(b) to Plaintiffs in or about October, November, and December 1999, for purposes of establishing their appropriate grade and step level at their new higher grade facility for purposes of conversion into the ATC pay system."

(App. 48A.) At ¶ 60 of their complaint, the Petitioners alleged that:

> "The Plaintiffs were entitled to transfer to their new ATC air traffic facilities in or about October, November, and December 1999, and have 5 U.S.C. §5334(b) applied for purposes of determining their appropriate grade and step level at their new facilities, and then convert into the ATC pay system through utilization of the Conversion Rule (Rule 35) in the same manner as all other air traffic controllers who converted into the ATC pay system who were not delayed by reason of the U.S. District Court Decision in *National Air Traffic*

> *Controllers Association, MEBA, AFL-CIO, supra*, that had vacated the privatization of Level 1 facilities because of the FAA's violation of law."

(App. 50A.) Petitioners could only surmise that the court of claims overlooked those allegations within their complaint when rendering its decision to dismiss their complaint for allegedly failing to cite to a money-mandating statute as a predicate for subject matter jurisdiction. Petitioners filed a timely appeal from that court's decision to the Federal Circuit Court of Appeals.

IV. Proceedings Before the Court of Appeals

Following briefing and oral argument, the court of appeals issued a decision on April 12, 2007 where it disagreed with the court of claims' disposition to dismiss Petitioners' case for lack of subject matter jurisdiction. (App. 11A.) That court found that because Petitioners sought relief in their complaint through application of §5334(b), that Petitioners' complaint was therefore predicated upon the application and enforcement of a money mandating statute sufficient to confer jurisdiction upon the court of claims. (*Id.*)

However, the court of appeals then proceeded to dismiss Petitioners' case on the merits finding that Petitioners had failed to state a claim upon which relief could be granted. (App. 11A.) That court concluded that Petitioners were not entitled to have §5334(b) applied to them upon transfer to higher grade facilities in 1999, finding Petitioners' assertion that their transfer occurred while they

were in the GS pay system to be conclusory because they "point to no factual evidence in dispute". (App. 7A.) The court of appeals determined that when the Petitioners moved to higher level facilities in 1999, they were moving from GS to non-GS positions and therefore under those circumstances §5334(b) was inapplicable. (App. 8A.) However, in determining that there was "no factual evidence in dispute", the court of appeals ignored that this case was not pending on a motion for summary judgment but rather on the government's motion to dismiss pursuant to Civil Rule 12. As such, Petitioners were not required to point to "factual evidence in dispute", but rather were required to point to factual allegations within their complaint to overcome the government's motion to dismiss.

Moreover, while the court of appeals asserted that Petitioners' complaint contends that the higher level air traffic facilities had transitioned into the ATC pay system, Petitioners disagree with that characterization and submit that it is air traffic controllers, not facilities, which transitioned into the ATC pay system. Under the GS pay system, the air traffic facilities to which Petitioners were transferring in 1999 were a Level 2 through Level 5 facility under the GS pay system, triggering their right to application of §5334(b). (Complaint at ¶29; App. at 40A.)

The court of appeals did not take as true the factual allegation within Petitioners' complaint that they transitioned to higher grade facilities in 1999 while under the GS pay system and draw all reasonable inferences from that allegation within

their favor. (Complaint at ¶¶52-61; App. 48A-51A.) As such, the court of appeals decision is in conflict with this Court's decision in *Jones v. Bock*, 127 S.Ct. 1910 (2007), where this Court held that a "complaint is subject to a dismissal for failure to state a claim if the allegations, taken as true, show that the Plaintiff is not entitled to relief". *Id.* at 920. Here, the court of appeals did not take factual allegations within Petitioners' complaint to be true.

Petitioners filed a timely petition for a panel re-hearing with the court of appeals. On June 22, 2007, the court of appeals denied Petitioners' petition for rehearing.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant the Petition Because the Federal Circuit Dismissed Petitioners' Case on the Merits for Having Allegedly Failed to State a Claim Upon Which Relief Could Be Granted Without Affording Petitioners an Opportunity to be Heard on the Merits, and Because That Court Did Not Take the Factual Allegations within Petitioners' Complaint as True, Conflicted with Civil Rule 12 and this Court's Decisions in *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106

(1976) and *Jones v. Bach*, 27 S. Ct. 910 (2007).

This Court should grant this petition for certiorari for the reason that the Federal Circuit dismissed Petitioners' case on the merits for allegedly having failed to state a claim upon which relief could be granted without affording Petitioners an opportunity to be heard on the merits, and because that court did not take the factual allegations within their complaint as true, in conflict with Civil Rule 12 and this Court's decisions in *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106 (1976) and *Jones v. Bach*, 27 S. Ct. 910 (2007) .

A. Court of Appeals Dismissed Petitioners' Claims on the Merits Pursuant to Civil Rule 12 Without Affording Petitioners An Opportunity To Present Evidence in Support of Their Claims on the Merits in Conflict With This Court's Decision in *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106 (1976).

In *Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff*, 428 U.S. 106 (1976), this Court reversed the judgment of a court of appeals that decided a case on the merits finding that the

petitioner had not had been afforded a reasonable opportunity to be heard on the merits. In *Wulff, supra*, this Court found that the petitioner had neither answered the complaint nor otherwise been provided with an opportunity to present evidence or make legal arguments in support of its position on the merits. This Court found that the court of appeals' resolution of the merits of the case to be an unacceptable exercise of appellate jurisdiction, holding:

> **It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.** In *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues... [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. **Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute. We think he**

> **was justified in not presenting those arguments to the Court of Appeals, and in assuming, rather, that he would at least be allowed to answer the complaint, should the Court of Appeals reinstate it.**

[Emphasis added.] *Id.* at 120.

Here, the court of appeals engaged in the same type of unacceptable appellate jurisdiction as the appellate court in *Wulff, supra*. When the court of appeals dismissed Petitioners' case on the merits for having allegedly failed to state a claim upon which relief could be granted, the court ignored that respondent never answered Petitioners' complaint and that Petitioner was never allowed an opportunity to conduct any discovery upon respondent for purposes of proving its factual allegations within their complaint.

Petitioners have never been provided with an opportunity to prove that they transferred to higher grade facilities while under the GS pay system in 1999, triggering the right to application of §5334(b) while under the GS pay system, prior to conversion into the ATC pay system. Therefore, this Court should grant certiorari and thereafter reverse the court of appeals, with instructions that this case be remanded to the court of claims so that Petitioners can be afforded an opportunity to prove this factual allegation within their complaint.

B. Court of Appeals Dismissed Petitioners' Claims on the Merits Pursuant to Civil Rule 12 By

Impermissibly Rejecting Factual Allegations Within Petitioners' Complaint in Conflict with *Jones v. Bach*, 127 S. Ct. 910 (2007).

Additionally, the court of appeals' decision to dismiss Petitioners' complaint on the merits for having allegedly failed to state a claim upon which relief could be granted pursuant to Civil Rule 12 conflicted with this Court's holding in *Jones v. Bach*, 127 S. Ct. 910 (2007), that "a complaint is subject to dismissal for failure to state a claim if the allegations, **taken as true**, show that the plaintiff is not entitled to relief." [Emphasis added.] *Id.* at 920. **Accord**, *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Here, the court rejected Petitioners' factual allegation within their complaint that they transferred to higher grade facilities in 1999 while under the GS pay system. The court of appeals asserted that such allegation was conclusory and that Petitioners did not point to any "factual evidence in dispute". (App. 7A.)

However, how could Petitioners point to factual evidence in dispute when respondent had not even answered their complaint? Further, this case was pending before that court on an appeal filed by Petitioners from a decision of the court of claims that dismissed their claims for lack of subject matter jurisdiction pursuant to Civil Rule 12. This case was not pending before the court of appeals on a motion for summary judgment pursuant to Civil Rule 56 on the merits of their claims.

Petitioners made the factual allegation in their complaint that they transferred to their higher grade facilities in 1999 while under the GS pay system. (Complaint at ¶¶52-61; App. 48A-51A.) If Petitioners are correct, there can be no dispute that Petitioners have stated a claim upon which relief could be granted.

5 U.S.C. §5334(b) provides, without any ambiguity, that where a federal employee transfers to a higher grade position under the GS system that employee is entitled to a two step increase in pay under the GS pay system. That is what Petitioners are requesting in this case. Contrary to the suggestion of the court below, Petitioners are not requesting a two step increase in pay under the ATC pay system. Because conversion into the ATC pay system is tied to an employee's GS grade and step, when the FAA did not confer Petitioners a two step increase in pay *under the GS pay system* upon their transfer to higher grade facilities in 1999, Petitioners were converted into the ATC pay system at a lower rate of pay than where they should have converted into that pay system. However, that does not change the fact that Petitioners are seeking application of §5334(b) to their transfer to higher grade facilities *under the GS pay system.*

Certiorari should be granted by this Court. Thereafter, the decision of the court of appeals should be reversed and this case remanded to the court of claims with instructions that Petitioners be afforded an opportunity to present evidence that supports the factual allegation within their complaint that they transferred from a Level 1

facility to a higher grade facility within the GS system in 1999, thus triggering application of § 5334(b) to them, prior to their conversion into the ATC pay system at that time.

II. This Court Should Grant The Petition Because The Federal Circuit's Decision That Petitioners Were Not Entitled To Application of 5 U.S.C. §5334(b) To Their Transfer to Higher Grade Facilities In 1999 While Under the GS Pay System Conflicts With that Statutory Provision and This Court's Decision in *United States v. Clark*, 454 U.S. 555 (1982).

This Court should grant the petition for the reason that the Federal Circuit's decision that Petitioners were not entitled to application of 5 U.S.C. §5334(b) to their transfer to higher grade air traffic facilities in 1999 while under the GS pay system conflicts with that statutory provision and this Court's decision in *United States v. Clark*, 454 U.S. 555 (1982). In *Clark, supra*, this Court held that a federal employee is entitled to have §5334(b) apply to transfers to a higher grade position within the GS pay system, ensuring a two step increase in pay when transferring to that higher grade position. In *Clark, supra*, this Court held that § 5334(b) did not apply to promotions between the WS and GS pay systems because there was no necessary or obvious relationship between those pay systems. This Court stated:

> **The absence of any indication that Congress intended § 5334(b) to**

> **apply to promotions into the GS from the WS is hardly surprising, since the two systems have no necessary or obvious relationship.** First, because the WS involves an entirely separate pay structure based on prevailing rates in local wage areas, no necessary overlap occurs between WS and GS salaries. In fact, since WS rates vary by locale, an employee changing from a WS position to a GS position could receive a greater salary, a lesser salary, or the same salary as another employee making the identical change in another part of the country. Moreover, although by definition a change to a higher grade within the GS system involves a change to a position with greater responsibility (see 5 U. S. C. § 5102(a)(5) (1976 ed., Supp. V)), no similar relationship necessarily exists between a WS grade and a GS grade.

Id. at 564.

Here, there is a necessary and obvious relationship between the ATC pay system and the GS pay system. The ATC pay system was created for air traffic controllers who were situated in the GS pay system for purposes of distributing an additional $200 million dollars to these air traffic controllers in pay. The ATC and GS pay systems were the same, but for this $200 million dollars to be distributed to those employees within the ATC pay system. Unlike in *Clark, supra*, where there was no necessary or

obvious relationship between the GS and WS pay systems, there was a necessary and obvious relationship between the ATC and GS pay systems.

As Petitioners alleged in their complaint, their transfer to higher grade facilities in 1999 should have consisted of these two steps: (1) transfer from their Level 1 Facility to a higher grade facility in 1999 ***while under the GS pay system*** thus triggering the right to have 5 U.S.C. § 5334(b) apply to them at their higher grade facility, and (2), then conversion into the ATC pay system at their higher grade facility based upon their GS grade and step level at their higher grade facility. (See, *e.g.*, Plaintiffs' Complaint at ¶¶46, 50, 51, 53, 60, and 61; App. 46A-51A.) The court of appeals incorrectly found that Petitioners were transferring from a GS to a non-GS position in 1999 and thus were not entitled to have §5334(b) apply. However, that court, in making that finding, impermissibly rejected Petitioners' aforementioned factual allegation within their complaint that they transferred to their higher grade facilities in 1999 *while under the GS pay system.* As such, the court of appeals engaged in an inappropriate exercise of appellate jurisdiction in conflict with Civil Rule 12, *Bach, supra,* and *Wulff, supra.*

Petitioners' GS grade and step determined how they converted into the ATC pay system. An air traffic controller who converted into the ATC pay system, based upon his/her being a GS 10, Step 10, converted into the ATC pay system at a higher level than another controller who converted into that ATC pay system based upon his having been a GS 10,

Step 5. This is because conversion into the AC pay system was based upon one's GS grade and step level. Petitioners seek application of §5334(b) such as to grant them a two step increase in pay while under the GS pay system at their higher grade facilities in 1999, as alleged in their complaint, prior to converting into the ATC pay system at these higher grade facilities. That request is in accordance with §5334(b) and *Clark, supra*. The decision of the court of appeals is in conflict with that statutory provision and this Court's decision in *Clark, supra*.

This Court should grant certiorari and thereafter reverse the decision of the court of appeals, because consistent with this Court's decision in *Clark, supra*, federal employees are entitled to application of §5334(b), when transferring to a higher grade position within the GS pay system.

CONCLUSION

The petition for a writ of certiorari should be granted and thereafter this Court should vacate the Federal Circuit's decision dismissing Petitioners' case on the merits, and remand the case to the court of claims to allow Petitioners to present evidence in support of their claims on the merits and/or for other relief as this Court deems appropriate.

September 20, 2007

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

2006-5113

TED A. BRODOWY, DIRK G. BROWN, CAROLYN M. GANDY, RON D. GANDY, TRACY JENSON, KENNETH B. KARNATH, JONATHAN A. MENDELSON, CLYDE A. SMITH, SHARON WILKINS, and MARILYN YAMAMOTO,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Malcolm S. Young, Thompson Hine LLP, of Cincinnati, Ohio, argued for plaintiffs-appellants.

Joan M. Stentiford, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, and Kathryn A. Bleecker, Assistant Director.

Appealed from: United States Court of Federal Claims

Judge Lawrence M. Baskir

United States Court of Appeals for the Federal Circuit

2006-5113

TED A. BRODOWY, DIRK G. BROWN, CAROLYN M. GANDY, RON D. GANDY, TRACY JENSON, KENNETH B. KARNATH, JONATHAN A. MENDELSON, CLYDE A. SMITH, SHARON WILKINS, and MARILYN YAMAMOTO,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: April 12, 2007

Before NEWMAN, Circuit Judge, CLEVENGER, Senior Circuit Judge, and BRYSON, Circuit Judge.

BRYSON, Circuit Judge.

This is a pay conversion case. The appellants are ten current or former Federal Aviation Administration air traffic controllers who are seeking to recover pay lost due to the government's failure to provide them with a two-step pay increase when they transferred to higher level airport facilities. The United States Court of Federal Claims dismissed their complaint for lack of jurisdiction. Although we hold that the trial court had jurisdiction over the claim, we affirm the dismissal because the appellants failed to state a claim for which relief can be granted.

I

This case arises out of the decision of the Federal Aviation Administration ("FAA") in the early 1990s to privatize many of its control tower operations and a subsequent agreement between the FAA and the air traffic controllers' union, the National Air Traffic Controllers Association ("NATCA"), to alter the compensation scheme for controllers at the remaining facilities. The present dispute stems from the fact that the new compensation scheme was implemented before the privatization plan had been completed.

The appellants were employed by the FAA as air traffic controllers at facilities designated as "Level 1" towers. The FAA classified control towers by the complexity and volume of their air traffic, ranging from Level 1 (least traffic) to Level 5 (most traffic). All controllers were compensated under the General Schedule ("GS") system,[1] with their pay grade being a function of the level of the facility where they worked. The pay grades ranged from GS-10 for Level 1 controllers to GS-15 for Level 5

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[1] The GS system is the compensation scheme commonly used for employees of the federal government in administrative, professional, and technical positions. In 1995 and 1996, Congress enacted legislation authorizing the FAA Administrator to implement a new personnel management system for FAA employees, including fixing the compensation and benefits of employees and officers. See Pub. L. No. 104-50, § 347, 109 Stat. 460 (1995); 49 U.S.C. §§ 106(1), 40122(a). Pursuant to that authorization, the Administrator promulgated the FAA Personnel Management System, which kept the GS compensation system in effect for an interim period beginning on April 1, 1996, until the new pay system could be developed and fully implemented.

controllers. Beginning in 1994, the FAA began to implement a plan to privatize all Level 1 facilities. It offered controllers in those towers the option to transfer to a higher level facility or to retire or resign from federal service. The appellants elected to transfer, and they were scheduled to move to higher level facilities in August 1998.

In March 1998, however, the United States District Court for the Northern District of Ohio ruled that the FAA had failed to conduct the required procedural analysis before initiating the privatization program. See Nat'l Air Traffic Controllers Ass'n v. Sec'y of the Dep't of Transp., 997 F. Supp. 874, 885 (N.D. Ohio 1998). The effect of the court's ruling was to temporarily halt the implementation of the privatization plan.

During the period that the privatization plan was halted, the FAA and the NATCA entered into a collective bargaining agreement that established a new compensation scheme for air traffic controllers. The new scheme was referred to as the Air Traffic Controller ("ATC") system.

The ATC system created a set of "Pay and Reclassification Rules" to replace the grades and steps of the GS system. Under the new scheme, controllers were assigned an ATC level and pay band (akin to GS grade and step levels). The collective bargaining agreement also contained a conversion rule ("Rule 35") for transferring air traffic controllers at Level 2 through Level 5 facilities from the GS system to the ATC system. It provided a formula for determining a controller's ATC level and pay band, which was based solely on the controller's prior GS

grade and step. However, Rule 35 did not call for controllers at Level 1 facilities to be transferred into the ATC system, as those towers were still slated for privatization. Instead, the Note to Rule 35 stated that Level 1 facilities would be "treated in accordance with current pay policies with the exception that their base pay will be increased by 5% in the first year."

The ATC pay scheme took effect in October 1998. Controllers at Level 2 through Level 5 facilities converted to the ATC system, while controllers at Level 1 facilities continued to be paid under the GS system. When the appellants eventually transferred from Level 1 facilities to higher level facilities in late 1999, the FAA determined their ATC level and pay band by applying the conversion formula to the GS level and step they held while working at the Level 1 towers.

The source of the appellants' complaint is that air traffic controllers who transferred to higher level towers prior to October 1998 were promoted to higher pay grades to correspond to the higher level of their new jobs within the GS system. Those air traffic controllers transferred within the GS system; because their transfer to a higher level facility was accompanied by a grade increase under the GS system, they were entitled under 5 U.S.C. § 5334(b) to be paid at a step level within the higher grade that was two steps above the level at which they were being paid in the lower rated facility. Because the appellants transferred from the Level 1 facilities after October 1998, they transferred from the GS system directly into the ATC pay system. They

therefore did not receive the benefit of the statutory two-step increase that they would have received if they had been transferred at a time when the GS system was still in effect for the facilities to which they transferred. As a result, the appellants were assigned a lower ATC level and pay band than similarly situated controllers who transferred from Level 1 facilities before the ATC system took effect. The appellants allege that the FAA's failure to promote them within the GS system before converting them to the ATC system caused them to lose the two-step increase guaranteed by Section 5334(b).

II

The appellants contend that, upon their transfer to the higher level towers, they were entitled to a pay increase under section 5334(b). That statute provides in relevant part as follows:

> An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred.

5 U.S.C. § 5334(b). The effect of section 5334(b) is to ensure that all employees who are promoted to a higher GS grade receive an increase in pay, not a reduction. Because the pay associated with high steps in one grade is often greater than the pay associated with low steps in the next higher grade, a

promotion from, for example, GS-10, step 10, to GS-11, step 1, would entail a loss of pay if it were not for the operation of section 5334(b).

While section 5334(b) ensures that grade promotions within the GS system do not result in a loss of pay, the case law makes clear that section 5334(b) applies only to employees who transfer from one position in the GS system to another position that is also within the GS system. See United States v. Clark, 454 U.S. 555, 561 (1982) (holding that section 5334(b) does not apply to a transfer from a non-GS system position into a GS system position); Libretto v. United States, 230 Ct. CI. 790, 791 (1982) (holding that section 5334(b) does not apply to a transfer from a GS system position into a non-GS system position). The question presented by this case is whether the appellants' transfers from Level 1 towers to higher level facilities were transfers within the GS system or transfers from the GS system into a non-GS system.

The appellants rest their claim on the theory that each of their transfers consisted of two steps: first, a promotion from a Level 1 facility to a higher level facility within the GS system (thus triggering section 5334(b)); and second, a conversion from the GS system into the ATC system by operation of Rule 35 of the collective bargaining agreement. Although the appellants characterize the two-step conversion process as a question of fact, they point to no factual evidence in dispute. Indeed, the existence of a first GS-to-GS step is contradicted by the allegations in the appellants' own complaint. As they assert repeatedly, by the time they transferred to higher

level facilities, those facilities had already transitioned to the ATC system. Thus, at the time they actually received their promotions, their new positions fell outside the GS system. All of the appellants' arguments to the contrary are conclusory; they offer no proof beyond the fact that air traffic controller positions at those facilities had previously been classified within the GS system. As the complaint acknowledges, air traffic controller positions at Level 2 through Level 5 facilities were within the GS system prior to October 1998 and within the ATC system thereafter. At the time the appellants moved to higher level facilities in 1999, they were moving from GS positions to non-GS positions. Under those circumstances, section 5334(b) is inapplicable.

While it may be that the parties to the collective bargaining agreement should have anticipated that some controllers would lose the benefit of section 5334(b) if they did not transfer into a higher level facility until after the conversion to the ATC pay system, the agreement did not provide a remedy for those employees, and federal law does not provide a remedy, either. It may be that the. collective bargaining process can rectify the problem, at least for the future. But what is clear from the collective bargaining agreement and section 5334(b) is that when the appellants transferred to their new facilities, they transferred out of the GS pay system and into the ATC pay system; they never transferred to a higher grade within the GS system and thus were not entitled to the benefits of the two-step increase in pay received by controllers who

transferred at a time when the GS system was in effect for all the facilities.

Although our legal analysis of the plaintiffs' claim under section 5334(b) tracks that of the Court of Federal Claims, that court dismissed the case for lack of jurisdiction and not on the merits. In that respect, we disagree with the court's disposition. The trial court agreed that section 5334(b) is a "money-mandating statute" and that if the appellants had been able to show they were persons entitled to the benefits of that statute, they would have been entitled to relief from the Court of Federal Claims. Where plaintiffs have invoked a money-mandating statute and have made a non-frivolous assertion that they are entitled to relief under the statute, we have held that the Court of Federal Claims has subject-matter jurisdiction over the case. See Fisher v. United States, 402 F.3d 1167, 1175-76 (Fed. Cir. 2005); see also Doe v. United States, 463 F.3d 1314, 1323-26 (Fed. Cir. 2006); In re United States, 463 F.3d 1328, 1335 (Fed. Cir. 2006).

An unusual quirk in this case is that at the time of their transfer from the Level 1 facilities, the plaintiffs were not technically being paid pursuant to the GS schedule set forth in title 5 of the U.S. Code, but instead were being paid pursuant to the FAA's Personnel Management System, the administrative order that adopted the GS pay system for the interim period pending conversion of the air traffic controllers to the ATC system. The statute that authorized the Administrator to implement a compensation scheme for the agency in 1996 also provided that the portions of title 5 containing the

GS system would no longer apply to FAA employees. See 49 U.S.C. § 40122. After April 1, 1996, FAA employees such as the plaintiffs were therefore being paid in accordance with the GS compensation system, but because of administrative order, not because of statutory direction.

That unusual feature does not alter our analysis of the jurisdictional issue, however, because the Court of Federal Claims has jurisdiction over money claims founded not only on statutes, but also on "any regulation of an executive department." 28 U.S.C. § 1491. An agency directive dealing with personnel policy qualifies as such a regulation if (1) the agency was authorized to issue the regulation; (2) the agency conformed to all procedural requirements in promulgating the regulation; (3) the agency intended the regulation to create a binding rule; and (4) the provision does not contravene a statute. Hamlet v. United States, 63 F.3d 1097, 1105 (Fed. Cir. 1995).

The FAA's adoption of the GS pay system in the 1996 Personnel Management System clearly qualifies as a regulation under that test. It was specifically authorized by statute and is not in conflict with the GS system compensation provisions or any other law; it was promulgated by the Administrator as directed by Congress; as a regulation dealing with "a matter relating to agency management or personnel," formal rulemaking was not required, 5 U.S.C. § 553(a)(2); and the agency's statement, in mandatory language, of its intention to continue to pay employees under the GS scale plainly reflects an intention to be bound by the

compensation policy set forth in the regulation. See Hamlet, 63 F.3d at 1105-06 & n.6. Treating the references to section 5334(b) in the complaint as directed to the Administrator's regulatory adoption of the standards of that statute as well as the other portions of the GS statutory scheme, we hold that the Personnel Management System was a binding, money-mandating regulation and that the Court of Federal Claims had jurisdiction over the plaintiffs' claim on that basis. The dismissal in this case therefore should have been for failure to state a claim upon which relief can be granted, not for lack of jurisdiction. Because the distinction between the two forms of dismissal has no apparent practical effect in this case, however, we need not remand for purposes of correcting the judgment in that respect. See Lewis v. United States, 70 F.3d 597, 603-04 (Fed. Cir. 1995); see also Doe v. United States, 463 F.3d at 1325 (dismissal of claim for want of jurisdiction was error, but error was harmless because action should have been dismissed on the merits); Moden v. United States, 404 F.3d 1335, 1340-41 (Fed. Cir. 2005) (same). Instead, we merely note that for any possible future effect that the judgment in this case may have, the dismissal should be regarded as a dismissal on the merits rather than for want of jurisdiction.

Each party shall bear its own costs for this appeal.

AFFIRMED.

In The United States Court of Federal Claims

No. 05-961C (consolidated)

TED A. BRODOWY, ET AL.,

JUDGEMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion, filed July 11, 2006, granting defendant's Motion to Dismiss,

IT IS SO ODERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. Each party shall bear its own costs.

Brian Bishop
Clerk of Court

July 11, 2006

By: /s/

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

In the United States Court of Federal Claims

Case No. 05-961C (Consolidated)
(Filed: July 11, 2006)
NOT TO BE PUBLISHED

***

OPINION

BASKIR, Judge.

Plaintiffs, current or former air traffic controllers, had been paid under the General Schedule ("GS") pay system prior to 1999. They all transferred to higher level facilities after the FAA converted all higher level facilities to a new pay system (the "ATC" system). They bring claims for back pay, alleging that they were entitled to a re-grade of their pay before or upon transferring to the new facilities and into the ATC pay system.. Plaintiffs fail to establish that their Complaint is grounded on a money-mandating statute. Therefore, the Defendant's Motion to Dismiss under Rule 12(b)(1) for lack of-subject matter jurisdiction Is granted. *See Fisher v. United States*, 402 F.3d 1167,1175 (Fed. Cir..2005).

BACKGROUND

Plaintiffs are ten air traffic controllers currently or formerly employed by the U.S. Federal Aviation Administration ("FAA") who seek the retroactive recovery of wages pursuant to the Back Pay Act. The FAA formerly employed air traffic controllers at facilities ranging in classification from Level 1 through Level 5, Level 5 towers being the busiest. The GS level of air traffic controllers was a function of their facility, ranging from GS 10 for Level 1 to GS 15 for Level 5. According to the Plaintiffs, all air traffic controllers were compensated under the (FG)GS pay system before 1998. The FG system refers generically to the system that was to be developed for FAA personnel pursuant to 49 U.S.C. §

40122(g)(1)..*See* Def. Br. at 19. The General Service ("GS") pay system is the general pay system for employees of the Federal Government in administrative, professional, and technical positions that is commonly utilized at other government agencies. The Plaintiffs continued to be paid under the GS system until late 1999, and they refer to that compensation as the (FG)GS system.

In July 1998, the National Air Traffic Controllers Association ("NATCA") and the FAA reached a collective bargaining agreement ("CBA") regarding the institution of a new pay system. This Air Traffic Controller ("ATC") pay system created a set of "Pay and Reclassification Rules" for FAA employees that was to replace the existing (FG)GS pay system. Under the new ATC pay system, air traffic controllers at each of the Level 2 through 5 facilities were given an ATC designation that ranged from 6 through 12. The ATC pay system provided broader "pay bands" within each level that replaced the grades and steps of the previous (FG)GS pay system. Rule 35 of the agreement outlined. a two-step procedure for converting the pay levels of air traffic controllers in Level 2 to 5 facilities from the (FG)GS to the ATC pay system. Rule 35's formula was not merit based, but rather tied to the air traffic controllers' previous grade and step levels under the old system. Level 1 facilities, however, were not classified within the new ATC levels.

Level 1 facilities were slated for private operation. From 1994 to 1998, the FAA privatized over seventy-five percent of its Level 1 air traffic facilities. Air traffic controllers at Level 1 facilities had to relocate

to another higher level facility to remain employed by the FAA, or could retire or resign from federal service. The FAA transferred these Level 1 air traffic controllers to other higher level facilities. The FAA then applied 5 U.S.C. § 5334(b), which dictates pay conversions for promotions or transfers within GS pay system, to establish the employees' higher pay grades under the (FG)GS pay system corresponding with their new, higher level jobs. Then, on October 1, 1995, the new ATC pay system came into effect for air traffic controllers employed at Level 2 to 5 facilities. Upon this conversion, the FAA applied Rule 35 to convert the pay levels of each employee who was already employed at facilities ranging from Level 2 through 5.

In March 1998, a US District Court temporarily vacated the FAA's privatization program. *See Nat'l Air Traffic Controllers Assn v. Sec'y of DOT*, 997 F. Supp. 874 (N.D. Ohio 1998). The FAA thus did not transfer its remaining Level 1 air traffic controllers, including Plaintiffs, before converting to the new ATC pay system. Plaintiffs remained at their Level 1 facilities and continued to be compensated under the (FG)GS pay system. The FAA did. not establish an ATC pay scale for Level 1 facilities. When in 1999 the privatization program was allowed to continue, Plaintiffs were transferred to higher level facilities in or about October, November, or December 1999, approximately a year after the conversion to the ATC system had taken effect at those facilities.

Plaintiffs transferred directly into the ATC pay system when they began at their higher level

facilities in 1999. Thus, their pay was automatically converted into the ATC pay system. Plaintiffs were assigned the lowest pay grade in the corresponding pay band of the ATC system, essentially being treated as newly hired employees. Plaintiffs allege that they understood from the FAA that they would transfer to the new ATC facilities under the (FG)GS pay regulations, be re-graded, and then through application of Rule 35 would convert into the ATC pay system at a higher level, just as the other air traffic controllers had. However, the FAA did not apply 5 U.S.C. § 5334(b) to determine Plaintiffs' new pay levels.

Plaintiffs filed their Complaint in this Court on August 31, 2005. They bring claims for back pay under the Back Pay Act; Rule 35 of the Pay and Reclassification Rules of the CBA, the Fifth Amendment to the U.S. Constitution, the Classification Act, and 5 U.S.C. § 5334(b). Plaintiffs claim that they lost pay steps they had earned under the (FG)GS pay system when they were assigned the lowest pay grade at their respective new facilities. The Defendant filed a Motion to Dismiss, which was fully briefed .and argued.

ANALYSIS

Before the Court is the Defendant's Motion to Dismiss for lack of subject matter Jurisdiction, based on Rule 12(b)(1) of the U.S. Court of Federal Claims ("RCFC"), or in the alternative, for failure to state a claim upon which relief can be granted under RCFC 12(b)(6). Because we find no subject matter jurisdiction, we do not address Defendant's

arguments under Rule 12(b)(6) for failure to state a claim.

On motions to dismiss, the Court views the facts alleged in the Complaint in the light most favorable to the non-moving party. *See Patton v. United States*, 64 Fed. CI. 768, 773 (2005). Because the Defendant's Motion challenges this Court's jurisdiction, we may also consider outside evidence. *Id.* at 773.

The U.S. Court of Federal Claims is, like all Federal courts, a court of limited jurisdiction. *See Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997). This Court may only hear a claim brought against the United States if Congress specifically and unambiguously waived the Government's sovereign immunity for such a suit. *United States v. King*, 395 .U.S. 1, 4 (1969). According to the Tucker Act, a suit may be brought in this Court if it is founded upon the Constitution, an Act of Congress, a regulation, or a contract with the United States, if it does not sound in tort. 28 U.S.C. § 1491(a)(1).

The Tucker Act does not itself create a substantive right of recovery; a plaintiff must identify a money-mandating provision creating a substantive right and waiving the United States' sovereign immunity in order for this Court to have jurisdiction. E.g., *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424. U.S. 392, 398 (1976). A money-mandating provision is one that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."

Testan, 424 U.S. at 400 (quoting *Eastport S.S.. Corp. v. United States*, 178 Ct. Cl. 599, 607 (1967)).

The Defendant's Motion also focuses on the argument that. Plaintiffs are seeking the benefit of positions to which they have not been appointed. However, the Court must first examine the provisions relied upon by Plaintiffs to determine whether any of them confers jurisdiction on this Court. As the necessary money-mandating provision, Plaintiffs rely upon the Back Pay Act, the ATC Pay and Reclassification Rules embodied in the collective bargaining agreement, the, Fifth Amendment to the U.S. Constitution, 5 U.S.C. § 5101 (the Classification Act) and 5 U.S.C. § 5334(b). At oral argument Plaintiffs rested solely on the latter-statute, but as jurisdiction is not waivable, we examine these other possible grounds as well.

A. The Back Pay Act

The Plaintiffs seek compensation under the Back Pay Act, 5 U.S.C. § 5596, for money allegedly due them based on an improper grade determination: The Back Pay Act entitles an employee to money damages when he or she Is found by appropriate authority under applicable law, rule, regulation; or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of his or her pay. 5 U.S.C. § 5596(b)(1).

It is well established that the Back Pay Act is not itself a jurisdictional statute, as Plaintiffs' counsel

conceded at oral argument. *See Salinas v. United States*, 52 Fed. Cl. 399, 401 (2002), an, 323 F.3d .1047 (Fed. Cir. 2003) (citing *United States v. Connolly*, 716 F,2d 882, 887 (Fed. -Cir.1983)). In order for this Court to have jurisdiction over a claim for back pay, "'[s]ome provision of law other than the Back Pay Act must first mandate, or at least be interpreted to mandate, money damages to an employee suffering an unjustified-or unwarranted personnel action ...'" *Salinas,* 52-Fed. CI. at 401 (quoting *Walker v. United. States*, 11 CI. Ct. 77, 80 (1986)); *accord Spagnola v. Stockman*, 732 F.2d 908, 912 (Fed. Cir. 1984). For these reasons, we must determine whether Plaintiffs have identified a statute or provision, other than the Back Pay Act, that mandates an award of money damages.

B. The Collective Bargaining Agreement

In its Motion, the Defendant contends that this Court does not have jurisdiction over a claim to enforce a collective bargaining agreement. In this case, the Plaintiffs rely upon the ATC Pay and Reclassification Rules, which are contained in a Memorandum of Understanding between the FAA and the NATCA, entered into on July 9, 1998. Plaintiffs ask us to enforce Rule 35, which requires that certain steps be taken when transferring employees from the FG(GS) system to the ATC system, including a step increase.

The Civil Service Reform Act ("CSRA") governs the enforcement of collective bargaining agreements in federal employment. *See* 5 U.S.C. § 7101 et seq. It

provides that negotiated grievance procedures, required to be in all CBAs, are "the exclusive administrative procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a)(1). The Court of Appeals for the Federal Circuit has held that Congress' addition of the word "administrative" to this provision in 1994 expressed its intent to allow judicial relief for employee grievances that fall within the scope of the negotiated grievance procedures. *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002);_ *accord O'Connor v. United States*, 308 F.3d 1233 (Fed. Cir. 2002). That is, the CSRA was not intended to prohibit judicial remedies that were otherwise provided by law. In contrast, the. Court of Appeals in *Salinas v. United States*; 323-F.3d 1047 (Fed. Cir. 2003),*held that the Merit Systems Protection Board had exclusive jurisdiction over the plaintiffs grievance claim, brought pursuant to the Back Pay Act.

In *Zaccardelli v. United States*; 68 Fed; CI. 426, 433 (2005), Judge Firestone reconciled these holdings and explained when the Court of Federal Claims has jurisdiction over claims based upon a CBA:

> When read together, *Salinas; Mudge*, and *O'Connor* stand for the proposition that the jurisdiction of the Court of Federal Claims over a claim covered by the CSRA depends on whether the claim involves a statutory basis for jurisdiction that is independent of the CSRA.

(*emphasis added*). In addition to a CBA and the CSRA, the cited cases involved claims pursuant to the Back Pay Act, the Prevailing Wage Systems Act, and the Fair Labor Standards Act, respectively. See Id. at 432.

The court in *Zaccardelli* noted that the Court of Federal Claims had jurisdiction over the plaintiffs' claims in *Mudge* and *O'Connor*, but not in *Salinas*. As mentioned earlier, this Court does not have jurisdiction based solely upon the Back Pay Act. Only the plaintiffs in *Mudge* and *O'Connor*, then, had articulated an independent, money mandating provision (the Prevailing Wage Systems Act and the Fair Labor Standards Act, respectively).

The CBA itself is not a contract within the meaning of the Tucker Act, so the plaintiff in *Zaccardelli*, who had not identified any other money-mandating statute, had not established jurisdiction in the Court of Federal Claims. *Id.* at 433. *Zaccardelli* is holding is consistent with our reading of the rule set forth in *Mudge* – that the CSRA does not deprive the employee of a judicial remedy for an employee grievance if jurisdiction in this Court otherwise exists. See *Mudge*, 308 F.3d at 1232 (The CSRA "no longer restricts a federal employee's right to pursue an employment grievance in court.").

One reason for the *Zaccardelli* rule is that federal employment is governed by statute, not by contract, *Adams v. United States*, 391 F.3d 1212, 1221 (Fed. Cir. 2004), so a collective bargaining agreement cannot be an independent basis to challenge a violation of federal employment. In addition,

although the CSRA does not deprive a plaintiff of his right to enforce independent statutory rights in court, it does provide a comprehensive scheme of administrative review applicable to remedy adverse employment actions. See *Mudge*, 308 F.3d at 1228.. The Merit Systems Protection Board's jurisdiction over those administrative claims prevents this Court from hearing suits for back pay based solely on violations of the CSRA that are covered by its administrative-review provisions. *See Salinas*, 323 F.3d at 1049; *see also Zaccardelli*, 68 Fed. CI. at 433 (refusing to assert jurisdiction over "claims of violations of the CBA [that] are simply employee grievances, which are governed by the CBA's grievance procedures; as set forth in the CSRA").

Applying *Zaccardelli* to the current case, it is clear that this Court has jurisdiction over Plaintiffs' claims only if they identify a money-mandating provision that is independent of the CBA itself.

C. The Classification Act

In their Complaint, Plaintiffs claim jurisdiction based upon the Classification Act of 1949, 5 U.S.C. § 5101. However, the parties do not address this statute in their briefs. Section 5101 provides for "a plan for classification of positions whereby... the principle of equal pay for substantially equal work will be followed." *Id.* The Plaintiffs invoke this statute apparently because they were treated differently from all other air traffic controllers who were converted to the ATC pay system.

In *Testan*, the Supreme Court squarely held that the Classification Act is not a money-mandating statute that waives the Government's sovereign immunity. *Testan*, 424 U.S. at 399-400. Although it provides for a classification system of equal pay for equal work, "none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified." *Id.*

As stated in *Testan*, it is not the case that Plaintiffs have no remedy at all – administrative relief is detailed in the Classification Act, id. at 403, as it is for enforcement of collective bargaining agreements in the Civil Service Reform Act, *Zaccardelli*,.68 Fed. CI. at 433. It is only the case that employees cannot seek retroactive classification and monetary relief in this Court for violations of those statutes alone.

D. 5 U.S.C. § 5334(b)

Plaintiffs, citing 5 U.S.C. § 5334(b), claim that they are entitled to a pay increase. That statute provides in part:

> An employee who is promoted or transferred to a position in a higher grade Is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred.

5 U.S.C. § 5334(b) *(emphasis added)*. "Grade" is given the definition it has in section 5102, see §5331(a), which defines it as:

> includ[ing] all classes of positions which, although different with respect to kind or subject-matter of work, are sufficiently equivalent as to – (A) level of difficult and responsibility; and (B) level of qualification requirements of the work; to warrant their inclusion within one range of rates of basic pay in the General Schedule.

5 U.S.C. § 5102(a)(5) (*emphasis added*).

> The implementing regulations define the scope of coverage as follows:
>
> This subpart covers employees who occupy positions classified and paid under the GS classification and pay system ... .

5 C.F.R. § 531.202. Under the regulations, "promotion" means:

> a GS employee's movement from one GS grade to a higher GS grade while continuously employed (including such a movement in conjunction with a transfer).

5 C.F.R. § 531.203 (*emphasis added*). "Transfer" means:

> a change of an employee, without a break in service of 1 full workday, from one branch of the Federal Government (executive,

> legislative, or judicial) to another or from one agency to another.

Id.

In examining an employee promotion from a non-GS position to a GS position, the U.S. Supreme Court held that section 5334(b) only applies to promotions within the GS system. *United States v. Clark*, 454 U.S. 555, 561 (1982). In *Clark*, the employees were promoted from a position in the prevailing rate wage system ("WS") to a position .of a higher grade in the GS system. The Court looked to the plain language of the statute and section 5102's definition of "grade," as quoted above. That term specifically references steps in the General Schedule. The Court concluded that the plain language of the statute compels the conclusion that the two-step increase rule of .section 5334(b) applies "only to promotions or transfers of employees already within the GS system." *Id.*

Plain meaning notwithstanding, the Court in *Clark* also examined the legislative history of section 5334(b) and concluded that Congress was only concerned with movement within the GS system, not movement between the GS and WS systems. Id. at 564. Finally, the Court analyzed a then-existing regulation, which dearly stated that the pay increase only applied to transfers or promotions within the GS system. ..Because "the construction of a statute by those charged with its administration is entitled to great deference," the Court concluded that the pay increase did not apply to employees transferring from another system. Id. at 565-66.

It was not clear whether the Supreme Court's reasoning in Clark also applied to the reverse situation — a promotion from the GS system to another system. The Federal Circuit has held that it did. *Libretto v. United States*, 230 Ct. CI. 790 (1982); *Morriss v. United States*, 231 Ct. CI.811 (1982). The Federal Circuit in those cases clearly stated:

> It therefore follows that section 5334(b) does not apply to movement between GS and WS in either direction.

Libretto; 230 Ct. Cl. at 791; *Morriss*, 231 Ct. Cl. at 812.

Although the ATC system is distinct from the WS system, the Supreme Court's reasoning applies equally to the instant case. The plain language of section 5334(b), as well as the implementing regulations, compel the conclusion that the statute only covers promotions or transfers within the GS system. See *Clark*, 454 U.S. at 561. Plaintiffs explicitly recognize that the Supreme Court's ruling limits section 5334's application to "transfers or promotions within the GS pay system." PI. Br. at 25. While they claim the benefits of section 5334(b) and claim it was "violated," *Id.*, they cannot escape the fact that all Level 2 through 5 ATC facilities were converted to the ATC pay system in 1998, *see* CSUF ¶ 10. Thus, Plaintiffs were transferred from the GS system to the ATC system in 1999; their transfers were not "within the GS system" as required by *Clark*.

Plaintiffs' counsel posited at oral argument that *Clark* is distinguishable from the present case. Unlike the WS system, the ATC system is essentially the same as the GS system. The Plaintiffs here did not change jobs, but were merely converted from one pay system to a new system that was, in effect, the same as the old. Plaintiffs' argument falls for two reasons. First, there are important differences between the ATC and GS pay systems, as Plaintiffs' counsel explained at oral argument. The ATC system does not contain steps within each pay band or grade, as the GS system does. Thus, an employee in a given ATC position is not subject to periodic increases In pay based on seniority.

Second, the Supreme Court's holding in *Clark* rested primarily upon the plain language of section 5334(b) and its implementing regulations – not upon the distinction between the GS and WS systems. *Clark*, 454 U.S. at 560-61. The Court's conclusion that there was "no necessary or obvious relationship" between the GS and WS systems was an additional yet unnecessary reason in support of its ruling; we do not read that as the determining rationale for the Court's holding. *See Id.* at 564-65. We think the rule set forth in *Clark* is clear and must be applied. in this case. *See Id.* at 561 ("[T]he statute and the accompanying regulations reveal a congressional intent to apply the two-step increase provision of § 5334(b) only to promotions or transfers of employees already within the GS system.").

Plaintiffs further argue that they were entitled to a pay increase based on a grade calculation after their

promotion but before they were converted to the ATC pay system. Pl. Br. at 13. They claim that section 5334(b) should have been applied to them "upon" their transfer to a new facility but "prior to" their conversion to the ATC pay system. See PI. Br. at 19. This is an attempt to fall within the coverage of section 5334(b) by implying that the transfer consisted- of two separate steps – first, a transfer "within" the GS system to a new facility, and second, a conversion to the new ATC system. However, they do not allege in their Complaint that their promotion in fact consisted of these two steps, or that they were ever paid under the GS system after transferring to their new ATC facilities. Their argument fails to acknowledge that the transfer to a new facility was a transfer into the ATC system. The new facilities had already been converted to the ATC system in October of 1998, and the FG (GS) pay system no longer existed for air traffic controllers. Their transfer was simultaneously one to a new facility and to a new pay system.

Plaintiffs do not point to any statutory provision that entitles them to a pay increase under the GS system prior to a transfer or promotion to the position that allegedly gives them the right to a higher rate of pay. The plain language of section 5334(b) applies upon the transfer or promotion in question, not sometime prior.

E. The Fifth Amendment

The Plaintiffs rely upon the Fifth Amendment to the U.S. Constitution in their Complaint. Although they do not specify which clause of the Fifth Amendment they refer to, they appear to be invoking the equal

protection clause. *See* Complaint at ¶ 64 ("Plaintiffs were converted in a different, and unequal manner in violation of the Fifth Amendment ....).

Neither the Fifth Amendment's due process clause, *Murray v. United States*, 817 F.2d 1580 (Fed. Cir.1987), nor its equal protection clause, *Bounds v. United States*,1 CI. Ct. 215 (1983), aft'd. without op., 723 F.2d 68 (Fed. Cir. 1983), is a money-mandating provision within the meaning of the Tucker Act. In their brief, the Plaintiffs do not respond to the Defendant's argument that we have no jurisdiction over due process claims. Although nothing prevents the Court from hearing constitutional claims, we must property assert jurisdiction over the complaint in the first instance. *See Terran v. Sec'y of DHHS*, 195 F.3d 1302, 1309-10 (Fed. Cir. 1999).

CONCLUSION

None of the provisions cited by the Plaintiffs is money-mandating, except section 5334(b). That provision is, however, clearly inapplicable to Plaintiffs' circumstances. Therefore, in the absence of a money-mandating provision supporting Plaintiffs' claims, we conclude we have no subject matter jurisdiction.

Defendant's Motion to Dismiss is hereby GRANTED, and Plaintiffs' Complaint is DISMISSED. Each party is to bear its own costs.

IT IS SO ORDERED.

_____

LAWRENCE M. BASKIR
Judge

TED A. BRODOWY, DIRK G. BROWN, CAROLYN M. GANDY, RON D. GANDY, TRACY JENSON, KENNETH B. KARNATH, JONATHAN A. MENDELSON, CLYDE A. SMITH, SHARON WILKINS, and MARILYN YAMAMOTO,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

2006-5113

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

June 22, 2007, Decided
June 22, 2007, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

PRIOR HISTORY: Brodowy v. United States, 482 F.3d 1370, 2007 U.S. App. LEXIS 8374 (Fed. Cir., 2007)

COUNSEL: [*1] For Carolyn M. Gandy, Clyde A. Smith, Dirk G. Brown, Jonathan A. Mendelson,

Kenneth B. Karnath, Marilyn Yamamoto, Ron D. Gandy, Sharon Wilkins, Ted A. Brodowy, Tracy Jenson, Plaintiffs-Appellants: YOUNG, MALCOLM SCOTT, PRINCIPAL ATTORNEY, Thompson Hine LLP, Cincinnati, OH.

For United States, Defendant-Appellee: STENTIFORD, JOAN M., PRINCIPAL ATTORNEY, Department of Justice, Washington, DC.

JUDGES: Before Newman, Circuit Judge, Clevenger, Senior Circuit Judge, and Bryson, Circuit Judge.

OPINION

ORDER

A petition for rehearing having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on June 29, 2007.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

1. TED A. BRODOWY
361 BEST PLACE ROAD
HELENA, MT 59602

and

2. DIRK G. BROWN
2120 DOPPLER STREET
STRASBURG, CO 80136

and

3. CAROLYN M. GANDY
267 JENNINGS ROAD
HORSEHEADS, NY 14845

and

4. RON D. GANDY
267 JENNINGS ROAD
HORSEHEADS, NY 14845

and

5. TRACY JENSON
32377 N. 6TH AVE.
SPIRIT LAKE, IDAHO 83869

and

6. KENNETH B. KARNATH
7800 SUNROSE DR. NW
ALBUQUERQUE, NM 87120

and

7. JONATHAN A. MENDELSON
57 STEEPLE DRIVE
KINTNERSVILLE, PA 18930

and

8. CLYDE A. SMITH
1341 DAYTON ROAD
HARRISBURG, PA 17113

and

9. SHARON WILKINS
19064 E. BELLEWOOD DR.
AURORA, CO 80015

and

10. MARILYN YAMAMOTO
P.O. BOX 711345
MOUNTAIN VIEW, HI 96771

Plaintiffs,

v.

THE UNITED STATES

Defendant.

COMPLAINT

Jurisdiction

11. Jurisdiction in this Complaint is proper under the Tucker Act, 28 U.S.C. §1491, for the reason that the Administrator of the Federal Aviation Administration (FAA), which is part of the United States Department of Transportation, violated Title V of the U.S. Code, including but not limited to 5 U.S.C. §5101 and §5334, and violated the Air Traffic Control (ATC) Pay and Reclassification Rules implemented by the FAA, and violated the Fifth Amendment Clause to the U.S. Constitution for purposes of converting Plaintiffs from the (FG)GS pay system into the ATC pay system in or about October, November, and December 1999.

12. The Tucker Act, 28 U.S.C. §1491(a)(1), provides that, "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

13. Pursuant to the Back Pay Act, 5 U.S.C. §5596, each of the Plaintiffs are entitled to the retroactive recovery of wages back to in or about October, November, or December 1999 because each

Plaintiff, as federal employees, have undergone an unjustified or unwarranted personnel action by the breach of the ATC Pay and Reclassification Rules, breach of 5 U.S.C. §5101 and §5334, and breach of the Fifth Amendment to the U.S. Constitution, that has resulted in the reduction of compensation to which each of the Plaintiff-employees are otherwise entitled.

Parties

14. Plaintiffs are, or were at all relevant times, employed as air traffic controllers by the FAA, an administrative part of the DOT, which is an executive branch agency of the United States.

15. The Defendant is the United States government and specifically the FAA, an administrative part of the United States Department of Transportation.

The Facts

16. In the early 1990s, the FAA determined that it would privatize operations at 129 Level 1 air traffic control towers (FAA-operated towers) from 1994 through 1998, approximately 25 per year.

17. This decision by the FAA caused all air traffic controllers employed by the FAA at Level 1 air traffic control towers to either (1) relocate to another FAA facility in order to remain employed by the FAA as air traffic control specialists; or (2) retire or resign from federal service.

18. In the 1990s, the FAA had five classifications of air traffic control towers, classified according to the level of complexity and the volume of the air traffic they handle, ranging from Level 1 through Level 5, with Level 5 towers being the busiest towers.

19. From 1994 through in or about March 2, 1998, when each of those air traffic controllers transferred from their Level 1 facilities to a higher level facility, the FAA applied 5 U.S.C. §5334(b) for purposes of determining their (FG)GS rate of pay at their new facility.

20. 5 U.S.C. §5334(b) provides that "an employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. If, in the case of an employee so promoted or transferred who is receiving basic pay at a rate in excess of the maximum rate of his grade, there is no rate in the higher grade which is at least two step-increases above his existing rate of basic pay, he is entitled to-- (1) the maximum rate of the higher grade; or (2) his existing rate of basic pay, if that rate is the higher."

21. On March 2, 1998, the U.S. District Court for the Northern District of Ohio in *National Air Traffic Controllers Association, MEBA, AFL-CIO v. Secretary of Department of Transportation* (N.D. Ohio 1998), 997 F. Supp. 874, vacated the FAA's privatization program for FAA-operated Level

1 towers for the reason that that FAA's decision to privatize Level 1 facilities did not meet the cost/benefit requirements of the Office of Management and Budget Circular A-76; a copy of which decision is attached as Exhibit "A".

22. At the time of the Court decision on March 2, 1998, the FAA had already privatized over 75% of its Level 1 air traffic facilities with the remaining Level 1 air traffic facilities scheduled to be privatized in August 1998.

23. Each of the Plaintiffs in this lawsuit, namely Ted A. Brodowy, Dirk G. Brown, Carolyn M. Gandy, Ron D. Gandy, Tracy A. Jenson, Kenneth B. Karnath, Jonathan A. Mendelson, Clyde A. Smith, Sharon Wilkins, and Marilyn Yamamoto, were employed as air traffic controllers for the FAA at Level 1 facilities in March 1998 at the time of the Court decision in *National Air Traffic Controllers Association, MEBA, AFL-CIO v. Secretary of Department of Transportation, supra.*

24. For the reason that the U.S. District Court in *National Air Traffic Controllers Association, MEBA, AFL-CIO, supra*, vacated the privatization of Level 1 facilities, the Plaintiffs in this lawsuit did not move to new air traffic facilities in August 1998 as previously scheduled by the FAA.

25. Effective October 1, 1998, the FAA instituted a new pay system for air traffic controllers called the Air Traffic Controller pay system (ATC pay system) which converted air traffic controllers at

Level 2 through Level 5 air traffic facilities from the (FG)GS pay system to the ATC pay system.

26. Level 1 air traffic facilities were not converted into the ATC pay system, effective October 1, 1998.

27. The FAA did not establish an ATC pay scale at a Level 1 facility effective October 1, 1998, and air traffic controllers who worked at those facilities continued to be paid under the (FG)GS pay system at that time..

28. Upon implementation of the ATC pay system, each of the Level 2 through Level 5 air traffic control towers were given an ATC grade, that ranged from 6 through 12.

29. Under the (FG)GS pay system, Level 2 through Level 5 air traffic facilities were higher grade facilities than Level 1 facilities, and upon changing to ATC facilities, these former Level 2 through Level 5 air traffic facilities continued to be higher grade facilities than the Level 1 air traffic facilities.

30. Each of the ATC grades had pay bands, analogous to the "steps" under the (FG)GS pay system.

31. This ATC pay system was created by reason of a reduction of front-line managers to front-line personnel that created an approximate $200 million dollar pool for pay raises to the controllers.

32. Conversion into the ATC pay system was based upon a formula tied into the air traffic controller's grade and step level under the (FG)GS pay system; it was not merit based.

33. Pursuant to 5 U.S.C. §5101(1)(A), the basic rate of pay that a federal employee is to receive is governed by the principle of equal pay for substantially equal work.

34. Conversion into ATC pay system was not supposed to deviate from the aforementioned principle in 5 U.S.C. §5101(1)(A) that each air traffic controller is to receive equal pay for substantially equal work.

35. A Rule 35 (hereafter the "Conversion Rule") was adopted by the FAA for purposes of converting an air traffic controller from the (FG)GS pay scale to the ATC pay scale .

36. The Conversion Rule (Rule 35) allowed air traffic controllers to maintain their former grade and steps under the FG(GS) pay system when converted to the ATC pay system.

37. The Conversion Rule (Rule 35) provides:

> 35.**CPC Conversion from the FG Pay Schedules to the ATC Pay Levels.**
>
> Effective October 1, 1998, the following steps will be taken to

transition bargaining unit employees to the ATC pay system. It is understood that the pay targets established under these rules will not be changed unless **required to accommodate distribution of the $200 million dollars as specified in paragraph 5 of the Principal MOA.**

Step 1: Establish the percentage difference between each employee's current FG grade and step above the current FG grade step for their assigned facility (including locality).

Step 2: Multiply the minimum base pay of the assigned ATC level pay band by that percentage. Add that figure to the minimum of the pay band to establish each employees target base pay. If the employee's target base pay does not exceed their current base pay by a minimum of 9.1%, the employee's target base pay will be adjusted upward to meet this minimum. Each employee's target base pay will be transitioned in three phases to reach the target base pay.

Year 1: Determine the first transitional base pay for each employee by:

A. Add 4.1% (ATRA) to each employee's base pay (FG grade, step plus locality);

B. Add any applicable IIP and/or Pay Demonstration entitlement; then,

C. Subtract the transition base pay from the target base pay to determine the amount of increase in base pay to be apportioned over the three years of the transition. Determine the amount to be apportioned in each year by the following approximate percentages:

Year 1=32.094%, Year 2=36.785%, Year 3=31.121% (totaling 100%). Add the year one increment to the transition pay base to determine the year one base pay; and,

D. Add (A), (B) and (C) to determine the first transitional base pay, retroactive to October 1, 1998.

Year 2: Add the identified dollar amount (Year 2(C)) to employee's base pay in the first full pay period of fiscal year 2000.

Year 3: Add the identified dollar amount (Year 3(C)) to

employee's base pay in the first full pay period of fiscal year 2001.

Note: **Facilities currently classified as Level 1, and that are scheduled to be contracted out by end of fiscal year 1998, will not be classified within the new ATC levels.** Those facilities will be treated in accordance with current pay policies with the exception that their base pay will be increased by 5% in the first year.

(A copy whereof is attached as part of Exhibit "B".)

38. The FAA did not apply the Conversion Rule (Rule 35) to any of the Plaintiffs in October 1998 because they were at a Level 1 facility on that date and each of the Plaintiffs remained under the (FG)GS pay system as indicated in the note to the Conversion Rule (Rule 35).

39. The only reason that the Plaintiffs continued to be at a Level 1 facility in October 1998 was because their Level 1 facility had not been privatized pursuant to the U.S. District Court decision in *National Air Traffic Controllers Association, MEBA, AFL-CIO v. Secretary of Department of Transportation* (N.D. Ohio 1998), 997 F. Supp. 874.

40. The FAA applied the Conversion Rule (Rule 35) to all other air traffic controllers who converted from the (FG)GS pay system into the ATC

pay system effective October 1998, and were employed at Level 2 through Level 5 air traffic facilities.

41. In or about March 1999, the FAA represented to the Court in *National Air Traffic Controllers Association, MEBA, AFL-CIO v. Secretary of Department of Transportation, supra* that it had complied with OMB Circular A-76 and that the privatization of remaining Level 1 air traffic towers was appropriate.

42. All air traffic controllers remaining at Level 1 facilities had until on or about April 1, 1999, to decide what ATC air traffic facility to transfer to, and a higher grade ATC air traffic facility paid more than a lower grade ATC pay facility.

43. In 1999, the FAA scheduled Plaintiffs (and other remaining air traffic controllers at Level 1 facilities) to transfer to ATC facilities in or about October, November, or December 1999 at which time each of the Plaintiffs would convert into the ATC pay system.

44. All ATC facilities in 1999 were previously Level 2 through 5 air traffic facilities and were facilities of a higher grade under the (FG)GS pay system than the Level 1 air traffic facilities that were being privatized.

45. At the time that Plaintiffs were transferred to their higher grade ATC facilities in or about October, November, or December 1999, Plaintiffs were paid under the (FG)GS pay system.

46. For the reason that Plaintiffs continued to be paid in 1999 in accordance with (FG)GS pay regulations, they should have transferred to their new ATC air traffic facilities in accordance with 5 U.S.C. §5334(b) for purposes of determining their appropriate grade and step at such facilities, and then had the Conversion Rule (Rule 35) applied to them to convert them from the (FG)GS pay system to the ATC pay system, as was done with all other air traffic controllers who transferred to higher level facilities and converted into the ATC pay system prior to the Court decision rendered in *National Air Traffic Controllers Association, MEBA, AFL-CIO v. Secretary of Department of Transportation, supra.*

47. The FAA did not apply 5 U.S.C. §5334(b) and the Conversion Rule (Rule 35) to each of the Plaintiffs to convert them from the (FG)GS pay system into the ATC pay system in or about October, November, or December 1999, and as a result Plaintiffs lost earned grade and pay steps during their conversion from the (FG)GS pay system to the ATC pay system.

48. At the time that each of the Plaintiffs chose an ATC air traffic facility to transfer to in 1999, Plaintiffs understood from the FAA that they would transfer to the new ATC facilities under the (FG)GS pay regulations and then through application of the Conversion Rule (Rule 35) would convert into the ATC pay system, and each of the Plaintiffs detrimentally relied upon that understanding from the FAA for purposes of choosing a particular ATC air traffic facility to which to transfer.

49. An ATC pay band is approximately $30,000 wide, and each of the Plaintiffs sustained losses of between approximately $10,000.00 per year and $30,000.00 per year by reason of the FAA's failure to transfer them to their ATC facilities pursuant to 5 U.S.C. §5334(B) for purposes of establishing their appropriate grade and step at such facility, and then apply the Conversion Rule (Rule 35) to convert them into the ATC pay system in or about October, November, or December 1999.

50. Since in or about October, November, and December 1999, Plaintiffs have exhausted all known means, without resort to this instant litigation, in an attempt to have the FAA apply 5 U.S.C. §5334(b) to them upon their transfer to a higher facility for purposes of establishing their appropriate grade and step, and apply the Conversion Rule (Rule 35) to convert them from the (FG)GS pay system to the ATC pay system as was applied to convert all other air traffic controllers from the (FG)GS to the ATC pay system who were not otherwise delayed by reason of the U.S. District Court Decision in *National Air Traffic Controllers Association, MEBA, AFL-CIO, supra*, that had vacated the privatization of Level 1 facilities because of the FAA's violation of law.

51. Through this lawsuit, Plaintiffs demand equal treatment for purposes of conversion from the (FG)GS pay system into the ATC pay system as was accorded all other air traffic controllers who converted into the ATC pay system who were not otherwise delayed by reason of the U.S. District

Court Decision in *National Air Traffic Controllers Association, MEBA, AFL-CIO, supra.*

COUNT I:

THE FAA VIOLATED TITLE V, 5 U.S.C. 5334(B) AND 5101(1)(A), ITS ATC PAY AND RECLASSIFICATION RULES, WHEN CONVERTING PLAINTIFFS FROM THE (FG)GS PAY SYSTEM TO THE ATC PAY SYSTEM ENTITLING PLAINTIFFS TO BACK PAY, FUTURE PAY ADJUSTMENT AND BENEFITS UNDER THE TUCKER ACT, 28 U.S.C. §1491 AND BACK PAY ACT, 5 U.S.C. §5596

52. Plaintiffs incorporate all prior allegations set forth in paragraphs 1 through 51 of the Complaint as if fully rewritten herein.

53. The United States unlawfully bypassed and violated its pay regulations by not applying 5 U.S.C. §5334(b) to Plaintiffs in or about October, November, and December 1999, for purposes of establishing their appropriate grade and step level at their new higher grade facility for purposes of conversion into the ATC pay system.

54. The United States' failure to apply 5 U.S.C. §5334(b) to each of the Plaintiffs upon their transfer to higher level facilities in October, November, and December 1999 meant that Plaintiffs were treated differently than all prior air traffic controllers who transferred from Level 1 facilities to higher level facilities from 1994 through March 2,

1998, during the first three (3) years of the privatization of Level 1 facilities.

55. The United States further violated its own ATC Pay and Reclassification Rules by not applying the Conversion Rule (Rule 35) to convert each of the Plaintiffs from the (FG)GS pay system into the ATC pay system, after establishing their appropriate grade and step level pursuant to 5 U.S.C. §5334(b) at their new facilities, in or about October 1999, November 1999, December 1999, when such Conversion Rule (Rule 35) was applied to all other air traffic controllers converted into the ATC pay system from the (FG)GS pay system who were not delayed by reason of the U.S. District Court Decision in *National Air Traffic Controllers Association, MEBA, AFL-CIO, supra*, that had vacated the privatization of Level 1 facilities because of the FAA's violation of law.

56. As a result of the United States failure to apply 5 U.S.C. §5334(b) to each of the Plaintiffs to establish their appropriate grade and step level at their new facilities in October, November, and December 1999, and use of the Conversion Rule (Rule 35) to convert them from the (FG)GS pay system to the ATC pay system, the Plaintiffs have suffered a loss of earned grade and pay steps during their conversion from the (FG)GS pay system into the ATC pay system as compared to other air traffic controllers to whom 5 U.S.C. §5334(b) and the Conversion Rule (Rule 35) were applied, and have sustained losses in compensation and earned benefits since October, November, or December 1999 in amounts ranging between $50,000.00 and

$150,000.00, which damages will continue to grow each year of their employment and into retirement because retirement income is based upon a percentage of their pay while an active air traffic controller.

58. The sole reason that Plaintiffs did not transfer from their Level 1 air traffic facility in 1998 and prior to the implementation of the ATC pay system effective October 1998 is the Court decision as reported in *National Air Traffic Controllers Association, MEBA, AFL-CIO v. Secretary of Department of Transportation* (N.D. Ohio 1998), 997 F. Supp. 874.

59. The FAA refused to apply the Conversion Rule (Rule 35) to Plaintiffs effective October, November or December 1999 upon their conversion into the ATC pay system in retaliation to the litigation giving rise to *National Air Traffic Controllers Association, MEBA, AFL-CIO v. Secretary of Department of Transportation* (N.D. Ohio 1998), 997 F. Supp. 874.

60. The Plaintiffs were entitled to transfer to their new ATC air traffic facilities in or about October, November, and December 1999, and have 5 U.S.C. §5334(b) applied for purposes of determining their appropriate grade and step level at their new facilities, and then convert into the ATC pay system through utilization of the Conversion Rule (Rule 35) in the same manner as all other air traffic controllers who converted into the ATC pay system who were not delayed by reason of the U.S. District Court Decision in *National Air Traffic Controllers Association, MEBA, AFL-CIO, supra*, that had

vacated the privatization of Level 1 facilities because of the FAA's violation of law.

61. The FAA violated 5 U.S.C. §5334(b) when they failed to apply that statutory provision to Plaintiffs upon their transfer to higher level facilities in October, November, and December 1999, to establish their (FG)GS grade and step and violated the Conversion Rule (Rule 35) and 5 U.S.C. §5101(1)(A), when they failed to utilize the Conversion Rule (Rule 35) to convert Plaintiffs from the (FG)GS pay system to the ATC pay system in October, November, and December 1999, and these violations entitle Plaintiffs to relief under the Back Pay Act, 5 U.S.C. §5596, and the adjustment of back pay, current and future pay and benefits retroactive to October, November, or December 1999 when they converted into the ATC pay system.

COUNT II:

THE FAA VIOLATED THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION BY NOT APPLYING TITLE V, 5 U.S.C. 5334(B), AND RULE 35 OF ITS ATC PAY AND RECLASSIFICATION RULES TO CONVERT PLAINTIFFS FROM THE (FG)GS PAY SYSTEM TO THE ATC PAY SYSTEM, IN THE SAME MANNER AS APPLIED TO ALL OTHER AIR TRAFFIC CONTROLLERS NOT DELAYED FROM CONVERTING INTO THE ATC PAY SYSTEM BY REASON OF THE U.S. DISTRICT COURT DECISION IN *NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, MEBA, AFL-CIO, SUPRA*, ENTITLING

PLAINTIFFS TO BACK PAY, FUTURE PAY ADJUSTMENT AND BENEFITS UNDER THE TUCKER ACT, 28 U.S.C. §1491 AND BACK PAY ACT, 5 U.S.C. §5596

62. Plaintiffs incorporate all prior allegations set forth in paragraphs 1 through 61 of the Complaint as if fully rewritten herein.

63. The United States did not apply 5 U.S.C. §5334(b) to each of the Plaintiffs for purposes of establishing their grade and step upon their transfer to higher grade facilities in October, November, and December 1999, and did not apply the Conversion Rule (Rule 35) to convert Plaintiffs from the (FG)GS pay system to ATC pay system because they were delayed from transferring from their Level 1 facilities by reason of the U.S. District Court Decision in *National Air Traffic Controllers Association, MEBA, AFL-CIO, supra*.

64. The United States' failure to apply 5 U.S.C §5334(b) to each of the Plaintiffs upon their transfer to higher grade air traffic facilities in October, November, and December 1999 for purposes of establishing their grade and step, and failure to apply the Conversion Rule (Rule 35) to convert each of the Plaintiffs from the (FG)GS pay system to the ATC pay system, meant that Plaintiffs were converted in a different, and unequal manner in violation of the Fifth Amendment to the U.S. Constitution, when compared to all other air traffic controllers who converted into the ATC pay system from the (FG)GS pay system who were not delayed by reason of the U.S. District Court Decision in

National Air Traffic Controllers Association, MEBA, AFL-CIO, supra.

65. As a result of the United States failure to apply 5 U.S.C. §5334(b) to each of the Plaintiffs upon their transfer to higher level facilities in October, November, and December 1999 for purposes of establishing their grade and step, and the Conversion Rule (Rule 35) to convert Plaintiffs from the (FG)GS pay system to the ATC pay system, Plaintiff have sustained losses in compensation and earned compensation benefits since October, November, or December 1999 in amounts ranging between $50,000.00 and $150,000.00, which damages will continue to grow each year of their employment and into retirement because retirement income is based upon a percentage of their pay while an active air traffic controller.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request the following relief from this Court:

A. Declaratory Judgment against the United States that it violated 5 U.S.C. §5334(b), by not applying that statutory provision to establish each of the Plaintiffs' grade and step upon their transfer to higher grade air traffic control facilities in or about October, November, and December 1999, and that the United States violated 5 U.S.C. 5101(1)(A) and its ATC Pay and Reclassification Rules by not applying the Conversion Rule (Rule 35) to convert each of the Plaintiffs from the (FG)GS pay system into the ATC pay system.

B. Declaratory Judgment against the United States that it violated the Fifth Amendment to the U.S. Constitution for failing to apply 5 U.S.C. §5334(b) to each of the Plaintiffs for purposes of determining their appropriate grade and step upon their transfer to higher grade air traffic facilities in October, November, and December 1999 and failure to apply the Conversion Rule (Rule 35) to convert Plaintiffs from the (FG)GS pay system to the ATC pay system as was applied to all other controllers converted into the ATC pay system who were not delayed from this conversion by reason of the U.S. District Court Decision in *National Air Traffic Controllers Association, MEBA, AFL-CIO, supra*.

C. That the FAA retroactively effect the transfer of Plaintiffs to their new higher grade facilities in or about October, November, or December 1999 by applying 5 U.S.C. §5334(b) to determine their appropriate and step at such facilities, and then apply the Conversion Rule (Rule 35) to each of the Plaintiffs to convert them into the ATC pay system (as was done to all other air traffic controllers not delayed from this conversion by *National Air Traffic Controllers Association, MEBA, AFL-CIO, supra*), with full back pay/benefit adjustments pursuant to the Back Pay Act, 5 U.S.C. §5596 and other applicable laws, as well as current and future pay/benefit adjustments.

D. Prejudgment interest on all monetary sums awarded to Plaintiffs;

E. Plaintiffs' attorneys fees and costs; and

F. Such other relief as the Court deems just.

Respectfully submitted,

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No. 07-393

In the Supreme Court of the United States

TED A. BRODOWY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioners were not entitled to a two-step pay increase pursuant to 5 U.S.C. 5334(b) (2000 & Supp. V 2005) upon their transfer to positions within the Air Traffic Controller pay system.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 482 F.3d 1370. The opinion of the United States Court of Federal Claims (Pet. App. 13a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2007. A petition for rehearing was denied on June 22, 2007 (Pet. App. 32a-33a). The petition for a writ of certiorari was filed on September 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are ten current or former air traffic controllers for the Federal Aviation Administration

(FAA). Pet. App. 2a. In the 1990s, the FAA categorized air traffic control towers into five levels, according to the volume of air traffic they handled and the complexity of the overall operations at each tower. *Id.* at 3a. Level 1 facilities were the least complex and least busy; Level 5 facilities were the busiest and most complex. *Ibid.* Controllers' government pay grades were determined by facility level. Each of the petitioners worked in a Level 1 facility until late 1999. *Id.* at 3a, 5a.

In the early 1990s, the FAA decided to privatize operations at all of its Level 1 facilities. Pet. App. 4a. As part of the privatization plan, controllers working at Level 1 facilities were given the opportunity to transfer to higher-level facilities and thereby remain FAA employees. *Ibid.* Petitioners were scheduled to be transferred to higher-level facilities in August 1998. *Ibid.* In March 1998, however, their transfers were postponed when a district court vacated the FAA's privatization program for failure to perform a required cost/benefit analysis. *Ibid.*; see *National Air Traffic Controllers Ass'n* v. *Secretary of Transp.*, 997 F. Supp. 874, 884-885 (N.D. Ohio 1998). The privatization program did not resume until 1999, after the FAA performed the required cost/benefit analysis. See Pet. App. 4a-5a.

2. In 1995, Congress enacted legislation authorizing the FAA Administrator to implement a new personnel management system for FAA employees, providing for "greater flexibility in * * * compensation." Department of Transportation and Related Agencies Appropriations Act, 1996 (Appropriations Act), Pub. L. No. 104-50, § 347(a), 109 Stat. 460 (49 U.S.C. 40122(g)(1)); see also 49 U.S.C. 106(*l*)(1). The General Schedule (GS) pay system no longer applied to FAA employees. See Appropriations Act, Pub. L. No. 104-50,

§ 347(b), 1[illegible]Stat. 460 (49 U.S.C. 40122(g)(2)). Pursuant to that authority, the FAA issued an administrative order on April 1, 1996, instituting a new pay system that, for the time being, mirrored the GS pay system pending conversion of the air traffic controllers to a new pay system. Pet. App. 3a n.1, 9a-10a.

In 1998, the FAA and petitioners' union, the National Air Traffic Controllers Association (NATCA), negotiated a new pay system for NATCA members through a collective bargaining agreement. Pet. App. 4a. Implementation of the new Air Traffic Controller (ATC) pay system was governed by "Pay and Reclassification Rules" agreed to by NATCA and the FAA. Under the new system, each employee was assigned an ATC level and a pay band. *Ibid.* Rule 35 provided a formula, based on a controller's grade and step under the GS pay system, for conversion to the ATC pay system. *Id.* at 4a-5a; see *id.* at 41a-44a (text of Rule 35).

The new ATC pay system took effect in October 1998, and superseded the GS system for all controllers except those (including petitioners) still working at Level 1 facilities, which the FAA still intended to privatize. Pet. App. 5a. Pursuant to Rule 35, controllers working at Level 1 facilities continued to be paid "in accordance with their current pay policies with the exception that their base pay will be increased by 5% in the first year." *Id.* at 5a, 44a.

Petitioners ultimately transferred to higher-level facilities in late 1999. Pet. App. 5a. At that time, they were converted to the new ATC pay system using the formula in Rule 35, based upon the GS grade and step level at which they were then working. *Ibid.*

3. In August 2005, petitioners filed suit in the United States Court of Federal Claims, claiming that

their transfers entitled them to higher salaries. Pet. 3; Pet. App. 53a-54a. They alleged that upon transferring to their new, higher-level facilities, they were entitled to be given a two-step pay increase under the GS pay system before their conversion to the ATC pay system. Petitioners relied on 5 U.S.C. 5334(b) (2000 & Supp. V 2005), which states in pertinent part:

> An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred.

Petitioners claimed that because they did not receive the two-step pay increase under Section 5334(b), they were assigned to a lower ATC level and pay band than similarly situated air traffic controllers who transferred to higher-level facilities before the conversion to the ATC pay system. Pet. App. 5a-6a.

4. The Court of Federal Claims dismissed the complaint. Pet. App. 13a-31a. The court held that petitioners had failed to identify an applicable money-mandating statute and therefore had not properly invoked the court's jurisdiction under the Tucker Act. *Id.* at 18a-19a. The court acknowledged that Section 5334(b) is a money-mandating statute, but held that it did not apply to petitioners at all. *Id.* at 24a-29a, 30a. Relying on *United States* v. *Clark*, 454 U.S. 555, 561 (1982), the court held that "[t]he plain language of section 5334(b), as well as the implementing regulations, compel the conclusion that the statute only covers promotions or transfers within the GS system." Pet. App. 27a. Petitioners transferred to higher-level facilities only after all such

facilities had already converted to the new system, so they did not transfer within the GS pay system. *Ibid.* The court also rejected petitioners' attempts to identify an alternative money-mandating statute. *Id.* at 19a-24a, 29a-30a.

5. The court of appeals unanimously affirmed. Pet. App. 1a-11a. The court explained that Section 5334(b) is intended to ensure that any promotion to a higher GS grade results in a pay increase; because, for instance, a GS-10, step 10, makes more than a GS-11, step 1, Section 5334(b) ensures that an employee promoted from GS-10 to GS-11 will receive a higher salary. Pet. App. 6a-7a. Under this Court's decision in *Clark*, the court of appeals held, Section 5334(b) performs that function only for transfers within the GS pay system. *Id.* at 7a.

The court of appeals rejected petitioners' contention that they had, in fact, transferred within the GS pay system. Pet. App. 7a-8a. Petitioners could not rely on the conclusory allegation in their complaint that they had undergone a "GS-to-GS" transfer; indeed, their own pleading showed that "by the time they transferred to higher level facilities, those facilities had already transitioned to the ATC system." *Ibid.*

Finally, the court of appeals noted that the complaint should have been dismissed for failure to state a claim, rather than for lack of subject matter jurisdiction. Section 5334(b) is a money-mandating statute, and although it does not apply to petitioners, their attempt to plead a claim under Section 5334(b) was sufficient to invoke the jurisdiction of the Court of Federal Claims. Pet. App. 9a-11a. The court of appeals observed, however, that "the distinction between the two forms of dismissal has no apparent practical effect in this case." *Id.* at 11a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court. Further review is unwarranted.

1. Petitioners contend (Pet. 13-19) that the court of appeals erred by rejecting their contention that their conversion occurred in two steps—first a transfer to the new facility while remaining on the GS pay system, then a conversion to the ATC pay system. See Pet. App. 7a. They argue that the complaint pleaded this two-step sequence as a factual matter, and that the court of appeals was required to credit it. That is incorrect.

As the court of appeals recognized, the complaint alleged only that petitioners were *entitled* to receive an increase under the GS pay system after transfer but before conversion. See Pet. App. 48a-50a. This assertion is a legal one, and the courts below were not required to credit it at the pleading stage. See, *e.g.*, *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1965 (2007) (citing *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986)). Indeed, petitioners' own complaint showed that their new facilities had already converted to the ATC pay system before they arrived, see Pet. App. 39a-40a.

Thus, the court of appeals correctly concluded that when petitioners transferred to the higher-level facilities, they were transferring outside the GS pay system. In any event, petitioners' fact-bound assertions about the correct reading of their complaint and the nature of their conversion do not warrant further review.

2. Petitioners also argue (Pet. 19-20) that even if the court of appeals were correct that they transferred out of the GS pay system, Section 5334(b) should still apply to their transfers. But as the court of appeals correctly held, this Court and the Federal Circuit's predecessor

court (the Court of Claims) have long since established that Section 5334(b) applies "only to promotions or transfers of employees already within the GS system," and not to transfers into or out of the GS pay system (absent some special indication by Congress). *United States* v. *Clark*, 454 U.S. 555, 561 (1982); see *Libretto* v. *United States*, 230 Ct. Cl. 790, 790 (1982).

Petitioners contend that the court of appeals misapplied *Clark* and that the ATC pay system is sufficiently similar to the GS pay system that Section 5334(b) should apply to transfers between the two different systems. Pet. 19-21. That argument is unavailing. In *Clark*, this Court did not hold that a "relationship" between the GS pay system and another pay system could render Section 5334(b) applicable to transfers between the two. To the contrary, the Court held that the "plain meaning" of Section 5334(b) and its related definitional provisions, see 5 U.S.C. 5102(a)(5), 5331, shows that the statute applies only to transfers within the GS pay system. *Clark*, 454 U.S. at 561. The Court also pointed to the relevant federal agency's consistent interpretation of the statute as applying only within the GS pay system. *Id.* at 565-566.* To resolve "any lingering doubt," the Court noted the absence of any legislative history supporting the notion that Congress meant to provide a two-level boost when employees transfer between the GS pay system and the Wage System; this was "hardly surprising," the Court noted, because the GS pay system and the Wage System had "no necessary or obvious relationship." *Id.* at 563, 564. The Court never suggested that establish-

* See 5 C.F.R. 531.214(a) ("The promotion rule in 5 U.S.C. 5334(b) and the implementing rules in this section apply only to a GS employee who is promoted from one GS grade to a higher GS grade."); *Clark*, 454 U.S. at 566 n.15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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